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IN THE

Supreme Court of the United States

No. 40 October Term, 1931.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN,
Receivers of MILLER ROBINSON COMPANY,
Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 881. October Term, 1931.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

ANSWER OF HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Horace B. Wilgus and David Bachman, Receivers of Miller Robinson Company, in answer to the petition for a writ of certiorari herein, which has been filed in this Honorable Court, dated April 12, 1932, respectfully show:

1. They admit that Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1000.00, which

matured on December 9, 1930. They aver that on January 9, 1931, a charter was granted by the State of Delaware to a corporation known as Miller Robinson Company, the application for which was made by said Herbert P. Robinson and his two sons. They aver that up to and including said day the said Robinson had carried on as an individual a retail lumber business in the City of Phladelphia, State of Pennsylvania, under the trade name of Miller Robinson & Company. They aver that on January 9, 1931, the said Robinson assigned all the assets of said business, and only those assets, to the new corporation, and received therefor the entire capital stock of said corporation. In addition to issuing to Robinson its entire capital stock, the corporation specifically and by name, including the name of Shapiro, assumed and agreed to pay and be liable for all debts owing by Robinson in the business which he had theretofore conducted. They deny that on January 12, 1931, Robinson alone applied for an equitable receivership. They aver on the contrary that for the reasons set forth in the bill filed, one John N. McLean, a creditor, and said Robinson did on January 12, 1931, file a bill in the District Court of the United States for the Eastern District of Pennsylvania upon which your respondents were appointed receivers on January 13, 1931.

2. They admit that Shapiro, the petitioner, brought suit against Robinson individually on January 16, 1931, and thereafter obtained judgment in said suit by default on February 4, 1931.

3. They admit that on February 26, 1931, Shapiro filed his petition in the District Court of the United States for leave to issue execution on his said judgment and to levy the same against the property which had been placed in the possession of the receivers. They admit that said petition alleged fraud and collusion. They deny that the answer

admitted the facts set forth in the petition. They aver that the said answer admitted the formation of the corporation, admitted the transfer of the assets, admitted the obtaining of the judgment and the filing of the said petition by Shapiro but denied the averments of fraud and collusion and denied that the transaction was for the purpose or with the intent to hinder, delay or defraud the petitioner or any other creditor of said Herbert P. Robinson.

4. They admit that the District Court of the United States on March 12, 1931, after argument upon petition and answer, without any proofs submitted in support of the averments in the petition, denied the petition without filing an opinion, and they admit that the order denying the petition was affirmed by the Circuit Court of Appeals of the United States for the Third Circuit in an opinion filed on December 31, 1931, and that a petition for rehearing was denied by said Court on January 28, 1932.

5. They admit that the schedule of assets and liabilities attached to the Bill of Complaint praying for the appointment of receivers shows that the assets of the corporation exceeded the liabilities by about $100,000.00 and they admit that the Circuit Court of Appeals stated in its opinion that Robinson was solvent at the time of the conveyance and the application for the receivership, and they aver that said Robinson was as a matter of fact at said times solvent.

6. They deny that the Circuit Court of Appeals affirmed the order of the District Court of the United States on the ground that Robinson procured the incorporation of a Delaware Corporation for the purpose of obtaining a receiver therefor in order to prevent suits against him and the consequent destruction of his business.

As to the reasons relied on for allowance of the writ prayed for, your respondents

RESPECTFULLY REPRESENT:

1. The right of the petitioner to levy on the goods under a judgment obtained against Robinson was postponed by reason of the appointment of the receivers and the consequent passing of the possession of said property to the hands of the Court for the equal protection of all creditors and the conservation of the rights of stockholders of the corporation.

2. The decree of the District Court refusing permission to levy an execution upon the assets in its possession did not deprive the petitioner of any right vested in him to have the question of fraud under the circumstances of this case determined by a jury.

3. Respondents on information and belief reiterate the averment in their answer to the petition filed by Shapiro in the District Court and deny that the creation of the corporation and the application for a receivership conferred a colorable jurisdiction on the District Court of the United States for the Eastern District of Pennsylvania on the ground of diversity of citizenship and your respondents respectfully call the attention of this Honorable Court to the fact that there is no testimony supporting or tending to support the averments of the petition.

4. Respondents deny that the conveyance to the corporation by said Robinson of the assets of said business rendered him insolvent and deny that it was fraudulent at common law in Pennsylvania and under the Pennsylvania Fraudulent Conveyance Act. Respondents aver that the transfer was not made without consideration and on the contrary that even if the transfer was a "conveyance" in the common meaning and intent of this word, the transaction was on a full and adequate consideration in that the

corporation expressly agreed to indemnify Robinson against the debts owing by said business and in addition to issue to him capital stock having an admitted value of $100,000.00 and that the rights and remedies of the creditors as against said Robinson and against said assets remained undisturbed and unchanged.

5. Respondents admit that if no receivers had been appointed for the corporation's assets, the petitioner might have made an attempt as set forth in paragraph 5 of his petition but that no such right existed upon the due and legal appointment of receivers by a court having jurisdiction to make such appointment.

6. Respondents deny that the practical result of the decision in this case is as set forth in paragraph 6 of the petition and deny that the effect of said decision would be to permit a solvent debtor to transfer his assets to a corporation with the conceded intent of getting them out of the reach of his creditors. Respondents aver that nowhere in the record is it conceded that there was any such intent and nowhere in the record does it show that the transaction resulted in the assets being placed out of the reach of creditors.

7. Your respondents respectfully suggest that the averments of paragraph 7 of the petition are immaterial inasmuch as it is obvious that the Circuit Court of Appeals used the word "preference" in a sense other than the word implies under the provisions of the Bankruptcy Act. There was no reason for considering the effect of the Bankruptcy Act. Under the admitted circumstances there could be no "preference" in this case as defined by or which would come within the provisions of the Bankruptcy Act.

8. Your respondents deny the averments of paragraph 8.

9. Your respondents deny that the decision violates the constitutional right of the petitioner to a trial by jury or otherwise.

Wherefore, these respondents pray that the said petition for writ of certiorari may be dismissed with costs.

And your respondents will ever pray, &c.

Horace B. Wilgus
David Bachman
Respondents.

Philadelphia, April 25th, 1932.

State of Pennsylvania, }
County of Philadelphia, } ss.

HORACE B. WILGUS, being duly sworn according to law, deposes and says, I am one of the respondents named in the foregoing Answer and that I reside in the City of Philadelphia, State of Pennsylvania; I am one of the receivers of Miller Robinson Company. Each and every allegation in the foregoing Answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Horace B. Wilgus

Sworn to and subscribed before me this 25th day of April, A. D. 1932.

(Seal) Anna L. Draeger
NOTARY PUBLIC
My Commission Expires Nov. 16, 1935

State of Pennsylvania,
County of Philadelphia, } ss.

DAVID BACHMAN, being duly sworn according to law, deposes and says, I am one of the respondents named in the foregoing Answer and that I reside in the City of Philadelphia, State of Pennsylvania; and I am one of the receivers of Miller Robinson Company. Each and every allegation in the foregoing Answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

David Bachman

Sworn to and subscribed before me this 25th day of April, A. D. 1932.

(Seal)

Anna L Wrede
NOTARY PUBLIC
My Commission Expires Nov. 16, 1933

COUNTER-STATEMENT OF THE CASE.

The material facts disclosed by the record are as follows:

Herbert P. Robinson was the owner of a retail lumber yard and business in Philadelphia carried on under the trade name of Miller Robinson & Company. He was in the usual condition of possessing various assets in connection with the business, including real estate, equipment, lumber, book accounts, etc., and had incurred various liabilities and indebtedness. He was solvent to the extent of approximately $100,000.00. He decided to change his individual ownership of the business to corporate form, and on January 9, 1931, obtained a charter under the laws

of the State of Delaware under the name of Miller Robinson Company. He transferred to the corporation all the assets of his business, both real and personal. The transfer, as appears by the records of the corporation, was made by Robinson expressly subject to all his debts, and the corporation affirmatively assumed and agreed to pay all the debts, including specifically by name, among others, the indebtedness due petitioner.

The corporation was capitalized at $100,000.00. The expressed consideration to Robinson for the transfer of the assets was the assumption of the liabilities and the agreement to pay them and the issuance by the corporation to Robinson of its capital stock. The assets, according to the valuation and appraisement made at the time, exceeded by approximately $100,000.00 the liabilities of the business subject to which the transfer was made.

Thereafter the corporation, though amply solvent, became temporarily embarrassed owing to suits pending and threatened and its inability to meet its then presently accruing indebtedness, and on January 12, 1931, a creditors' and stockholders' Bill was filed in the District Court of the United States for the Eastern District of Pennsylvania. On this Bill the Court appointed the present respondents receivers to take possession of the assets and business of the corporation and to conduct the same in the interest of its creditors and stockholders.

In making the appointment, the Court issued an order restraining suits against the Receivers and interference with the possession of the assets in the hands of the Receivers. The respondents duly qualified as Receivers, entered into possession of the assets of the corporation and continued to conduct its business.

On January 16, 1931, petitioner brought a suit against Herbert P. Robinson individually in the Court of Common Pleas of Philadelphia County on a note given by

Robinson to petition and judgment in said suit was entered against Robinson on February 4, 1931.

Petitioner thereafter, on February 26, 1931, filed a petition in the receivership proceedings asking for a rule on the Receivers to show cause why he should not be permitted to issue an execution on his judgment in the State Court against Robinson and levy the same on the assets in the hands of the Receivers. The Receivers only were made parties respondent in that petition. An answer was filed setting forth the foregoing facts and denying the averments of conclusions of fraud and collusion and intent to hinder and delay creditors which were contained in the petition.

ARGUMENT.

The application in this matter is based upon the contention of the petitioner that he has been deprived of his constitutional right to a trial by jury.

Shapiro, the petitioner, filed a petition in the lower court in which he asked for leave to issue an execution on a judgment obtained by him in the courts of the State of Pennsylvania against Herbert P. Robinson in order that the execution might be levied upon the assets of a corporation known as Miller Robinson Company, which corporation and its assets were in the hands of receivers appointed by the District Court. The receivers had taken possession of the company and its assets before Shapiro instituted the suit in which he obtained the judgment. To this petition the receivers filed an answer.

Two questions are present:

I. Was the proceeding in which the controversy arose of a nature entitling the petitioner to a jury trial?

II. Was there any controversy which could be submitted to a jury?

I.

The constitutional right invoked by Shapiro is contained in the VII amendment which provides that:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This amendment did not nor was it intended to enlarge the rights of parties to trial by jury. It provided for the preservation of the right to a trial by jury. If no right existed, theretofore, none was conferred under the amendment. The direction to "preserve" the right to a jury trial does not apply to cases other than to suits at common law.

The Constitution of the State of Pennsylvania, Section 6, similarly provides:

> "Trial by jury shall be as heretofore and the right thereof remain inviolate."

This secures to litigants the right to a jury trial as it existed theretofore.

In *Byers v. Commonwealth,* 42 Pa. 94 (1862), the defendant was convicted in a summary proceeding of a statutory violation. He contended that the statute which provided for the summary proceeding was repugnant to the clause in the Declaration of Rights in the Constitution which guarantees that "trial by jury shall be as heretofore." The court held that the measure of this constitutional guarantee was to be sought in the usages which pre-

vailed at the time when it was asserted, and that in courts of equity and in many other classes of cases there never was a right to trial by jury.

In the instant case the application was made to a court of equity, in an equitable proceeding in which the court, to conserve the assets, appointed receivers. Shapiro's application was not directed to the status of the receivership, nor was it for the purpose of attacking or dissolving the receivership. It was a petition or appeal to the conscience of a Chancellor and permission to disregard the order of the court so that the petitioner might attempt to enforce a right which he claimed to have. In such cases the Chancellor decides questions of fact as well as law, and there is no violation of a constitutional guarantee.

The petitioner has been deprived of no rights. The receivership does not divest any lien he may have against the assets in the hands of the receivers. Its only effect is to postpone his right to enforce such lien. The court, appointing a receiver, has not only the power but is under a duty to protect from interference the property which it has taken into its possession and the exercise of such power is not a deprivation of due process of law. This is so, even though the right set up is claimed to be superior to the right of the receivers.

II.

There were no controversial facts to be submitted to a jury. The facts complained of by Shapiro, and on which he relied to induce the court to give him permission to take the independent action, are those set out in his petition. The District Court and the Circuit Court of Appeals held that the alleged facts did not constitute a fraud. If the averments in Shapiro's petition standing alone and untraversed might have constituted in the minds of the court a sufficient cause for permitting him to take the independent

action, the receivers filed a responsive answer to such allegations. The effect of this answer was to negative Shapiro's allegations. If he desired to substantiate and support his allegations by proof, in order to strengthen his appeal to the conscience of the Chancellor, the method of so doing is well established and the opportunity was open to him to take depositions. This petitioner did not at any time request or demand a trial by jury, irregular as such a demand might have been.

In the brief of the petitioner before this Court he admits that he was not asking the Court below to find fraud, but to permit him to go into another court to try to prove his allegations. To put it another way, the District Court and the Circuit Court of Appeals were asked to permit the petitioner to interfere with the orderly administration of the receivership without requiring him to prove at least *prima facie* his allegations, notwithstanding the fact that the allegations were met with a positive denial.

The District Court and the Circuit Court of Appeals decided the question on petition and answer, a proceeding in force long before the adoption of our Constitution and a proceeding well within the powers and jurisdiction of those courts.

CONCLUSION.

There was no error in the conclusions reached by the District Court and the Circuit Court of Appeals. The case was tried according to the customary and usual practice, and not in violation of the VII Constitutional Amendment guaranteeing trial by jury.

Respectfully submitted,

SIDNEY E. SMITH,
Attorney for Respondents.